Prior knowledge: Must you tell the court?

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Sometimes a prosecutor may not have a defendant's complete criminal history and you may be aware that your client has prior convictions.

The question is whether you, as a defence lawyer, must disclose the information you have on your client's priors to the court.

Let us assume that our client has pleaded guilty to driving a motor vehicle with a blood alcohol level of 0.11%. On sentencing, the police prosecutor informs the magistrate that your client has no previous convictions. You are aware that your client was previously convicted of a similar offence within the last three years. What is your ethical duty?

The general proposition is that, as a defence lawyer, we are not required to disclose to the court our client's adverse criminal history ('the general principle'). Our duty is to act in our client's best interests (*Rule 4.1.1 Australian Solicitors Conduct Rules* (ASCR)) and as a consequence we should not make such a disclosure to the prosecutor or the court unless our client specifically instructs us to do so and the client understands the consequences of doing so (refer to the obligation of confidentiality in Rule 9 ASCR, the obligation to provide clear and timely advice to permit a client to make informed choices in Rule 7.1 and the need to follow a client's lawful, proper and competent instructions in Rule 8.1).

In *R v Bourchas* [2002] NSWCCA 373 (*Bourchas*), Giles JA (with whom Levine and Sperling JJ agreed) noted in sentencing the Crown and defence act within the adversary system. His Honour also said that "… it is not consistent with that system that the offender is under a duty to bring forward everything adverse to the offender's interests on sentencing" [at paragraph 92].

The rationale for this was best explained by Thomas J (with whom Connolly and Ambrose JJ agreed) in *Boyd v Sandercock, ex parte Sandercock* (1990) 2 QdR 26 at 28 (*Boyd*):

"A court is bound to decide a case on the evidence before it. The penalty that was imposed was entirely in conformity with both the facts and the law. All that happened was that the prosecutor failed to provide evidence to the court of a relevant fact. The consequence of this should be no different from that in any other case where a party fails to call relevant evidence. It makes no difference whether the proceedings follow a plea of guilty or not guilty. The court is to decide the case on the evidence before it. Of course where a party deliberately misleads the court, other remedies may exist … Nothing like that happened in the present case in which the prosecutor was simply not aware of the previous conviction and elected to proceed on the assumption that there were no previous convictions. The solicitor for the appellant was in the circumstances under no positive duty to bring it to the attention of the court."

We cannot knowingly or recklessly mislead a court (Rule 19.1 ASCR) by either the words we use or by omitting what may be necessary to be said. This is to avoid being either misleading or deceptive to the court (*R v Rumpf* [1988] VR 466 at 472 per McGarvie (*Rumpf*)). As Lord Chelmsford once observed, "half a truth will sometimes amount to a real falsehood" (*Peek v Gurney* (1873) LR 6 HL 377 at 392).

So as long as we do not put before the court misleading statements or half-truths, it is not our duty to disclose matters detrimental to our client, for example, prior convictions, or adverse aspects of his or her antecedents or character. In these circumstances we walk a fine line in how we craft our submissions. We cannot put submissions that would suggest the client has not previously offended in the manner disclosed to us by the client but of which the court is unaware (Peter Hidden, 'Some ethical problems for the criminal advocate' (2003) 27 Crim LJ 191 at 194 (*Hidden*)).

The general duty to not mislead or deceive a court either knowingly or recklessly can be found in Rule 19.1 of the *ASCR*. This general duty is a specific application of the paramount duty in Rule 3 of the ASCR. Our ethical duty – noted in *Bourchas, Boyd* and *Rumpf* – is recognised in Rule 19.10 of the ASCR:

"A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer."

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